Kerala Gazette No. 3 dated 20th January 1981.
PART I A

GOVERNMENT OF KERALA

Election Department

NOTIFICATION

No. 9474/EL1/80/Elec. *Dated, Trivandrum, 4th November* 1980.

Notification No. 82/KL-LA/6/80 dated 28th October 1980 of the Election Commission of India is hereby published.

By order,

J. S. Jesudhasan,
Special Secretary (Home) &
Chief Electoral Officer.

ELECTION COMMISSION OF INDIA

Nirvachan Sadan,
Ashok Road,
New Delhi—110001.

Dated 28*th October*, 1980

Kartika 6, 1902 (*Saka*)

NOTIFICATION

No. 82/KL-LA/6/80.—In pursuance of section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the judgment of the High Court of Kerala dated 9th September 1980 in Election Petition No. 6 of 1980.

In the High Court of Kerala at Ernakulam

Present :

THE HONOURABLE MR. JUSTICE GEORGE VADAKKEL

Tuesday, the 9th September, 1980/18th Bhadra, 1902

ELECTION PETITION No. 6/1980.

Petitioner :

P. R. Francis, Porathur House, P. O. Ollur.

By Advocates M/s. S. Narayanan Poti,
S. Sankara Subban
Dr. George Thomas and
N. Gopinath

Respondents :

1. Raghavan Pozhakadavil P.O. Karalam, (Via) Irinjalakuda.
2. V. N. Mohanan, Vakkath House, Chemboothara, P.O. Pattikad.
3. Joseph Adhikaram, Adhikarathil House, P.O. Vettukad, Trichur-5.

R1 by Advocates M/s. C. K. S. Panicker,
P. G. P. Panicker,
V. Bhaskara Menon,
K. S. Radhakrishnan,
P. B. Mohankumar, and
T. R. Raman Pillai.

This Election Petition having been finally heard on 21-8-1980 and having stood over to this day for consideration, the Court delivered the following:—

JUDGMENT

The petitioner complains of undue return of the 1st respondent from the Ollur Assembly Constituency at the election held in January 1980. He alleges commission of the corrupt practices of undue influence and appeal to religious sentiments by the 1st respondent's agents with his (1st respondent's) knowledge and consent and at his instance; and of the electoral offence of violation of section 130 (1) (c) of the Representation of the People Act, 1951 (hereinafter, the Act) by the 1st respondent. He also complains of undue election on the ground of non-compliance with article 326 of the constitution. The 1st respondent defends his return denying all the material allegations advanced by the petitoner.

2. The corrupt practices alleged are:— (1) Publication of Ext. P4 by P.W. 6 as the Convenor of the Diocasan Political Committee of the Trichur Catholic Diocese (hereinafter mentioned as the Political Committee) and of Ext. P5 by him in his personal capacity; and (ii) Preaching of sermons by Rev. Fr. Cyriac Mandumpala (hereinafter for brevity, M) and

Rev. Fr. Antony Anthicad (hereinafter, shortly A). The accusation of electoral offence is that the 1st respondent drove into polling stations exhibiting his symbol in front of his car. The complaint of non-compliance with article 326 of the Constitntion is founded on the allegation that several persons below 21 years of age as on 1-1-1979 have been entered in the electoral roll of the Constitutency.

3. The following are the issues raised in this case after hearing the learned counsel on both sides:—

"1. Is the petition liable to be rejected on the gronnd that it has not been presented by the petitioner in person ?

2. Is it liable to be rejected on the gronnd that the affidavit in support of it is not in conformity with the requirements of law ?

3. Is it not maintainable for want of details in respect of the allegation of corrnpt practices or of the invalidity of the electoral roll?

4. Whether the election of the 1st respondent is void on account of the corrupt practices under section 123 (2) of the R.P. Act, 1951 as alleged in paragraphs 2 and 3 of the election petition.

5. Whether the Political Committee of the Foranas of the Trichnr Catholic Diocese and/or Rev. Fr. Thomas Thalachira acted as the agent of or with the consent of the 1st respondent in procnring the printing and in publishing of the statements similar to Annexure I and/or Annexure II ?

6. Whether printed statements similar to Annexures I and II were distributed among the voters in Ollur Constituency by the agents and snpporters of the 1st respondent ?

7. Whether the election of the 1st respondent is void on account of the corrupt practices under section 123 (2) and 123 (3) of the R.P. Act, as alleged in paragraph 4 of the election petition ?

8. Whether Rev. Fr. Cyriac Mandumpala and/or Rev. Fr. Antony Anthicad acted as the agents of or with the consent of the 1st respondent ?

9. Whether the corrupt practices under section 123 (2) and 123 (3) of the R. P. Act alleged in paragraphs 2, 3 and 4 of the petition were committed in the interest of the 1st respondent and whether the election of the 1st respondent has been materially affected by the aforesaid corrupt practices ?

10. Is the 1st respondent guilty of the electoral offence under section 130 (1) (c) of the R. P. Act, 1951 for the reasons stated in paragraph 5 of the petition ? If so has it affected the election of the 1st respondent materially ?

11. Were several voters included in the electoral rolls of the Ollur Constituency disentitled to vote as they had not attained the age of 21 years as on 1-1-1979? Have such disqualified voters exercised their franchise in the elec tion? Are their votes invalid and liable to be rejected? Has the election of the 1st respondent been materially affected for this reason?

12. Is the petitioner precluded from challenging the correctness of the voters' list as contended by the 1st respondent in paragraph 8 of his counter statement?

13. Is the election of the 1st respondent liable to be declared void?

14. Is the petitioner entitled to a declaration that he has been duly elected?

15. What is the order as to costs?"

4. *Issues* 5, 6 *and* 8:—These issues raised the question whether the Political Committee in passing Ext. P4 resolution, P.W. 6 in getting Exts.P4 and P5 printed and published, the several persons who, as spoken to by P.Ws. 9 to 16, distributed Ext. P4 in doing so and M and A in delivering the alleged sermons acted at the agents of the 1st respondent or with his consent. The petitioner appears to have been in two minds as to where to pitch his case founded on the allegations regarding corrupt practices, on section 100 (1) (b) or section 100 (1) (d) (ii) of the Act. He nowhere in the petition has specified the particular ground or grounds mentioned in section 100 except for stating that the petition is one also under, among the several sections of the Act mentioned therein, section 100 in a general manner. The facts which constitute the corrupt practices could have been more clearly correlated to one or the other of the grounds of corrupt practice mentioned in section 100 of the Act subsection (1)(b) or subsection 1 (b)(ii).

5. The person who commits the corrupt practices enumerated in section 123 of the Act may be the returned candidate (hereinafter the candidate) himself, his election agent, his agent, or any other person. If it is proved that the candidate or his election agent is guilty of the commission of a corrupt practice, Election Law will not pardon it on any account and the court will have to declare the election of the candidate as void. The same is the case when it is proved that any person other than the candidate or his election agent, be he the candidates agent or not, has committed a corrupt practice with the consent of the candidate or his election agent. These cases fall under section 100 (1) (b) is concerned what is material is not the connotation of the word 'agent' (which does not occur therein except in the expression 'election agent') but whether any person has acted in the matter of the commission of the corrupt practice with the consent of the candidate or his election agent. In this connection it is necessary to advert to Explanation (1) to section 123 of the Act as per which the expression 'agent' used in the several subsections thereof is to be understood as including an election agent, a polling agent and also 'any person who

is held to have acted as an agent in connection with the election with the consent of the candidate' and compare it with the expression in section 100 (1) (b) of the Act 'that any corrupt practice has been committed ...... by any other person with the consent of a returned candidate or his election agent'. As stated by a Division Bench of this Court in *Abdul Majeed V. Bhargavan* (AIR 1963 Kerala 18 at 23):—

> "Consent of the actual commission of the corrupt practice under subsection (1) (b) must be differentiated from consent which is part of the definition of the term 'agent' in the Explanation to section 123, which is consent given to a person by the candidate, and never, be it noted, by the election agent, to act 'as an agent in connection with the election'. The latter consent is part of the make-up or the constitution of an agent, and without such consent, which may be either express or implied, there could be no agency even in the law of election."

6. Section 100 (1) (d) (ii) says that the commission of a corrupt practice by the candidate's agent other than his election agent is a ground for setting aside the candidate's election provided such commission of corrupt practice by him has materially affected the result of the election in so far as it concerns the returned candidate. Here no question of consent to the commission of the corrupt practice by the candidate or his election agent arises. The petitioner need prove only that the person who committed the corrupt practice is the candidate's agent and further that such commission of the corrupt practice has affected the result of the election in so far as the candidate is concerned. Read with Explanation (1) to section 123 of the Act, any person who is held to have acted with the consent of the candidate as his agent in connection with the election (but not the election agent), that is to say, a person to whom the candidate has given consent, expressly or impliedly, to act as his agent in connection with the election is the agent mentioned in this provision. Here the candidate is responsible to his acts vicariously not because the candidate has consented to the actual commission of any corrupt practice by him but he has been constituted the candidate's agent. Even if such an agent exceeds his authority the candidate is responsible for his agent's misdeeds provided the result of the election, in so far as it concerns the candidate, has been materially affected thereby

7. The Scheme of the Act is such that in the last-mentioned case of commission of corrupt practice by an agent (other than his election agent) section 100 (2) is of some assistance to the candidate. Under this provision when the courts is of '*Opinion*' that the candidate is guilty by an agent of any corrupt practice but is *satisfied*' that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election, that his agent committed it contrary to the orders and without the consent of the candidate or his election agent, that neither of them has committed any corrupt practice and that in all other respects the election was free from any corrupt practice on his part and on

the part of his agents, the court may decide the election of the candidate is not void. The court can form the 'opinion' in the first instance only on cogent evidence adduced in that behalf, the *onus probandi* here being on the petitioner, and be 'satisfied' of the matters mentioned in clauses(a), (c) and (d) of section 100 (2) of the Act at the second instance only on strict proof of the several matters mentioned therein by the candidate.

8. It is with this distinction in mind that in enumerating the several corrupt practices the several subsections of section 123 of the Act use the expressions 'candidate', 'his agent' and any other person with the consent of the candidate or his election agent' and explanation (1) thereto says that the expression 'agent' in section 123 'includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.'. It is neither possible nor feasible to attempt at a definition of the word 'agent' as understood in the Election Law. That word is not to be understood in the limited sense it is used in the Law of Contracts or the Common Law Agency, but in a broader sense as taking in also persons who are not and would not necessarily be agents thereunder. However there should be proof that the candidate (not even his election agent) has given his consent, expressly or impliedly, to the person alleged to be the candidate's agent to act as his agent in connection with the election to hold that that person is an agent of the candidate.

9. P.W. 6 admits publication of Exts. P4 and P5. For the present purpose it is not necessary to examine the contents thereof in order to decide whether these documents attract subsections (2) and/or (3) of section 123 of the Act as alleged. Suffice to state for the purpose of deciding Issue 5 that it was not even suggested to P.W. 6, the witness examined to prove the facts that the Political Committee passed Ext. P4 resolution and that P.W. 6 got Exts. P4 and P5 printed and published, that either the Political Committee in passing Ext. P4 resolution or PW. 6 in publishing Exts. P4 and P5 did so with the 1st respondent's consent, or that the 1st respondent has given his consent to the Political Committee and to P.W. 6 to act as his agents in connection with his election. The submission is that I should infer 'consent' for both the Political Committee and P. W. 6 acting as agents of the 1st respondent and the Political Committee passing the resolution and P.W.6 publishing Exts. P4 and P5—from such circumstances as the identity of the object sought to be achieved by the publication of Exts. P4 and P5, namely, the return of the Janadhipathya Munnani candidates and the formation of the Political Committee in the Trichur Diocese for that purpose. So far as the case on hand is concerned the petitioner has not proved even knowledge on the part of the 1st respondent about the formation of the Political Committee, about the passing of Ext. P4 resolution by the Political Committee, and/or about the printing and publication of Exts P4 and P5 by P.W. 6. 'The similarity of ideas or even of words cannot be pressed into service to show consent'; *S. N. Balakrishna* v. *Fernandez* (AIR 1969 SC 1201 at 1220). 'Consent cannot be inferred from mere knowledge'; ibid (1221). 'There must be reasonable evidence from which an inference can be made of the meeting of

the minds or at least a tacit approval of the general conduct of the agent; ibid (1219). It was further laid down in that decision as follows:—

> "The principle of law is settled, that consent may be inferred from circumstantial evidence but the circumstances must point unerringly to the conclusion and must not admit of any other explanation. Although the trial of an election petition is made in accordance with the Code of Civil Procedure, it has been laid down that a corrupt practice must be proved in the same way as a criminal charge is proved. In other words; the election petitioner must exclude every hypothesis except that of guilt on the part of the returned candidate or his election agent." ibid (1221).

In the light of the principles stated above and taking into account the fact that it has not even proved that the 1st respondent had knowledge about any of these acts, of the formation of the Political Committee, of the passing of resolution by that Committee, of P.W. 6 printing or publishing Exts. P4 and P5, there is no merit in the contention that the 1st respondent acquiesced thereto and that 1st respondent's consent thereto should be inferred from such acquiescence.

10. Some reliance was sought to be made by the learned counsel for the petitioner on *B. Rajagopala Rao* v. *N.G. Ranga* (AIR 1971 SC 267 at 275) in support of his contention that from acquiescence consent can be inferred. Where a candidate or his election agent has prior knowledge about another's intention to do one of the acts stated in section 123 of the Act, and it is within his power to stop the Commission thereof by that other person but does not do so; perhaps depending upon the facts and circumstances of each case, consent for doing so on the part of him who knew about such intention of the other may be inferred. There is no proof of any such prior knowledge of the 1st respondent or his election agent about the Political Committee passing Ext. P4 resolution or P.W. 6 getting Exts. P4 and P5 printed and published. Nor is there any proof that it was within the power of either of them to stop the Political Committee or P W. 6 from doing so. As a matter of fact (as will be seen later on) the evidence is to the effect that the Political Committee and P. W. 6 acted on their own, as free-agents, though not at cross-purposes.

11. I do not think that the decisions in *Nani Gopal* v. *Abdul Hamid* (AIR 1959 Assam 200) and *Inder Lall* v. *Lal Singh* (AIR 1961 Rajasthan 122) relied on by the learned counsel lays down any different principle on the matter of agency in the Election Law as is clear from the following passage from the Judgment of Sarjoo Prosad C. J. in the Assam case:—

> "If it is found that the person concerned was merely an officious intermeddler in the election or a mere volunteer, then of course the candidate cannot be said to have any responsibility for his action, even though the person may have acted for the candidate's benefit and with a view to advance his interest in the election."

This decision also lays down the principle that 'an association of persons or a society or a political party or its permanent members who set up a candidate, Sponser his cause and work to promote his election may be aptly called the agent of the candidate for election purposes. In *Inder Lall* v. *Lal Singh* (AIR 1961 Rajasthan 122) the same learned Chief Justice applied the above principle with reference to the facts of that case to hold that the District Congress Committee, the Nagar Congress Committee and their secretaries and Publicity Secretary were all agents of the returned candidate. There is neither pleading nor proof that the Political Committee set up the I respondent as a candidate or sponsored his cause.

12. Under Issue 6 the question that requires to be decided is as to whether these persons who according to the petitioner have distributed Exts. P4 and P5 are the 1st respondent's agents. It should here be noticed that except for baldly stated that the distribution of Ext. P4 was 'by the agents and supporters of the 1st respondent' and that Ext. P5 was 'distributed by the workers and supporters of the I respondent', the pleadings do not set forth the full particulars thereof as required by section 83 (1) (b) of the Act. The petitioner has adduced some oral evidence to prove the distribution of Ext. P4. P. Ws. 9 and 12 speak of its distribution in the premises of Ollur Church to the dispersing congregation; P. Ws. 13 and 14 speak of its distribution in the premises of Mariapuram Church to the congregation returning home; P. W. 10 of its distribution in Mannuthy Bazar; P. W. 11 and 15 of its distribution at Puthur from house to house and at Puthur junction; and P.W. 16 of its distribution at the gate of the Kuriachira Church, to those returning home after church-service. According to P. W. 9 one A. A. Chacku distributed Ext. P4 and this Chacku is the Ollur Congress (I) Mandalam President. According to P. W. 12 one Akkara Chacku distributed Ext. P4 and he is the Ollur Congress (I) Mandalam President. At Mariapuram the distribution was, as deposed by P. Ws. 13 and 14 by Madhurakkari Jos, Parappan Chakkunni and Vallacheri Anthony who according to these witnesses are Congress (I) workers because they have been seen going about distributing notices, and slips and pasting wall-posters. P. W. 10's evidence is that one Kochappen distributed Ext. P4 at Mannuthy bazar. The evidence of P. Ws. 11 and 15 is that Thekkumpuram Yacob, Thekkumpuram Anto and one Impavu Thoma distributed Ext. P4 at Puthur, and of these as stated by P. W. 15, Thoma is the Congress (I) President and the others are Congress (I) workers; and as deposed by P. W. 11 all are Congress (I) workers because they have been seen participating in different activities of that party. According to P. W. 16 it was K. V. Anto and Jos P. Xavier who distributed Ext. P4 at the Church-gate at Kuriachira; and they are Congress (I) workers because he has seen these persons participating in Congress (I) party activities.

13. P. W. 9 is a member of the Congress (U) party of the petitioner and P. W. 10, a member of the C. P. I. (M) party which as a constituent party of the Idathupaksha Janadhipathya Munnani, supported the petitioner. P. Ws. 12 to 16 are supporters or sympathisers of Congress

(U) Party. P. W. 12 admits that he was the licensee of A.R.D. No. 305 ration shop, that his licence was cancelled, that its present licensee is his brother and that he (P. W. 12) is still running that shop as its manager. The suggestion in cross-examination is that he is the real licensee and that the cancelled licence was re-issued in the name of his brother through the good offices of the petitioner who then was an M.L.A. P. W. 11 claims to have been the I respondent's polling agent at Polling Station No. 55 at Cherukunnu. According to him he submitted an application which he got prepared by some one (he does not remember who) who was in the polling booth on the morning of the polling day to the 'Returning Officer' (he does not seem to know of the distinction between a Returning Officer and a President Officer) and the 'Returning Officer' issued a card and that is how he became the I respondent's polling agent. Mark, the candidate, the I respondent or his election agent, does not come into the picture at all. His evidence read as a whole gives me the impression that he is not a truthfull witness;

14. The question is whether those persons who according to these witnesses have distributed Ext. P4 at several places are the I respondent's agents and it does not concern very much about the factum of distribution by them. Except for their statement that these persons are workers of Congress (I) Party of the I respondent or office bearers of that Party in very general terms, there is no evidence to support the same. It is by now well-settled that in election cases it is not safe to accept oral evidence at its face value without looking for assurance from some surer circumstances or unimpeachable documents'. See *Rahim Khan* v. *Kurshid Ahmed* (AIR 1975 SC 290 at 298–99), *Kanhaiyalal* v. *Mannalal* (AIR 1976 SC 1886 at 1893) and *Amolak Chand* v. *Bhagwandas* (AIR 1977 SC 813 at 819) Applying the principles laid down by the Supreme Court in these cases, I am not prepared to find that those persons who, as stated by P.Ws. 9 to 16 distributed Ext. P4 at various places, so distributed or that they are workers or office-bearers of the Congress (I) Party of the I respondent. The suggestion in the cross-examination is that some of them are workers of the Political Committee. In this connection it is to be noticed that though the distribution was in public places like bazars, road junctions and church premises, the petitioner has not been able to examine any non-partisan witness who does not support him or the I respondent.

15. Though pleadings contain the bald allegation that the Political Committee, and/or P. W 6 and those who distributed Ext. P4 acted as the agents of the I respondent, there is absolutely no acceptable evidence supporting the same.

It has also not been established that the Political Committee passed Ext. P4 resolution and/or P. W. 6 got Exts. P4 and P5 printed and published with the consent of the 1st respondent, or that the persons alleged to have distributed Ext. P4 did so with his consent.

16. I will now examine Issue 8 which raises the question as to whether the two priests, Rev. Frs. Cyriac Mandumpala and Antony Anthicad acted as the agents of or with the consent of the 1st respondent. The petitioner

has not examined these two priests. He relies on the oral evidence of P. Ws. 9 and 12 to prove what Rev. Fr. Cyeiac Mandumpala said in the sermon alleged to have been given by him in the Ollur Church on 20-1-1980, and the oral evidence of P. Ws. 13 and 14 to peove what Rev. Fe Antony Anthicad said in the sermon he is said to have given on 20-1-1980 in the Mariapuram Chuech.

17. As deposed by P. W. 9, in his sermon on 20-1-1980 Rev. Fr. Mandumpala exhorted the congregation to vote against the petitionee for the reason, according to Rev. Fr. Mandumpala as deposed by P. W. 9, that Idathupaksha Munnani is in allicnee with Marxists and therefore, if they who are atheists are voted into power, there will be difficulties for the church and belief in God. It is also his evidence that Rev. Fr. Mandumpala said so as direeted by His Excellency Bishop Kunjukulam of Trichue Diocese. His evidence is also to the effect that Rev. Fe. Mandumpala during that sermon eead out a copy of Ext P4 and emphasised the statements therein. Accoeding to him he and two others met the Bishop and complained to him about Fe. Mandumpala's sermon. The Bishop told them that it is in the light of the decision of the Bishop's] conference that it was so said and told them not to vote to the petitioner who is in alliance with the Marxists, adding that it was his (Bishop's) advice (ഇത് എന്റെ ഉപദേശമാണ് എന്ന് അദ്ദേഹം തങ്ങളോട് പറഞ്ഞു). This witness also says that Rev. Fr. Mandumpala gave similae guidelines dueing the time of the Paeliament Elections that took place peior to the Assembly Elections supporting the Congress (I) candidate and opposing the C. P. I. candidate of the Idathupaksha Janadhipathya Munnani. P. W. 12 says that Fr. Mandumpala during sermon time of the second mass said not to vote foe the petitioner because of his alliance with the communists.

18. The evidence of P. W. 13 is that Rev. Fr. Antony Anthicad dueing 9 a. m. mass said to comply with guidelines given by the Bishops, as otherwise it will be an act of opposition to the faith and the Bishops. In cross-examination he says that the sermon was one ceiticising communism and the Communist Party, and exhorting to vote foe believers in God and not to vote to the communists. P. W. 14's evidence is also to the same effect. According to him Fe. Anthicad said not to vote foe the petitionee because he is in alliance with the communists of the Idathupaksha Janadhipathya Munnani.

19. The evidence of the foue witnesses, P. Ws. 9 and 12 to 14 does not peove the case of the petitionee that these two peiests aee agents of the 1st eespondent and/oe that they acted with his consent. On the other hand their evidence as eegards the substance of the sermons shows that these priests weee acting in accordance with the decision taken by the Bishop's conference, and that they acted the same way also during the Parliament Elections that preceded the Assembly Elections.

20. My answers to issues 5, 6 and 8 aee in the negative, that is to say against the petitioner and in favoue of the 1st eespondent.

21. *Issues 4, 7 and 9* :—These issues can be dealt with together. The main question that falls to be decided under these issues is as to whether the contents of Exts. P4 and P5, and those of the sermons given by Rev. Frs. Mandumpala and Anthicad constitute corrupt practices under subsections (2) and (3) of section 123 of the Act. Though subsection (3) has also been mentioned in the petition, no arguments relying on that provision were addressed before me by the learned counsel for the petitioner. The main theme of the argument was that Exts. P4 and P5 contain and the sermons contained threats of divine displeasure and/or spiritual censure unless the electors voted for the I respondent and refrained from voting for the petitioner. It is also contended that even otherwise, Exts. P4 and P5 and the sermons amount to interference or at any rate, to an attempt to interfere, with the free exercise of their electoral right by the electorate or a section thereof, the Catholic voters.

22. Before I examine Exts. P4 and P5 and the two sermons with reference to clause (a) (ii) of the proviso to section 123(2), it will be useful to understand the scope of section 100(1)(b) read with section 123 (2) with reference to utterances, verbal and/or written, made by religious heads and priests who may, perhaps, have great influence, on their followers. These persons are also citizens of this country. They are also clothed with all the privileges and rights of a citizen and saddled with all the duties and responsibilities that any citizen has. In *Ram Dial V. Sant Lal* (AIR 1959 SC 855) the Supreme Court said :—

> "It was contended on behalf of the appellant that a religious leader has as much the right to freedom of speech as any other citizen, and that, therefore, his exhortation in favour of a particular candidate should not have the result of vitiating the election. There cannot be the least doubt that a religious leader has the right freely to express his opinion on the comparative merits of the contesting candidates and to canvass for such of them as he considers worthy of the confidence of the electors. In other words, the religious leader has a right to exercise his influence in favour of any particular candidate by voting for him and by canvassing votes of others for him. He has a right to express his opinion on the individual merits of the candidates. Such a course of conduct on his part, will only be a use of his great influence amongst a particular section of the voters in the constituency." (at pp. 859-60)

Therefore, as any other citizen can use his influence amongst such electors as those over whom he has influence, a man of religion is also entitled to use his influence amongst his followers over whom he has influence. However, in both cases weilding of such influence as each of them has over those within his sphare of influence will become an abuse thereof amounting to the corrupt practice of undue influence within the meaning of section 123(2) of the Act if two conditions are obtained, namely, (i) if they pass the bounds of persuasion and use compulsion of any sort in any manner including appeal to the fears of divine displeasure, spiritual censure, expulsion social ostracism or excommunication; and (ii) compulsion

is so used *with the consent of the candidate or his Election agent.* Only then, that is to say, only when there is on element of compulsion and that is resorted to *with the consent of the candidate or his election agent* would section 100(1)(b) read with section 123(*2*) of the Act be attracted in such cases. Where the person against whom the allegation of commission of undue influence is made, be he an ordinary citizen or a man or religion, is himself the candidate or his election agent, of course, there will arise no question of the candidate's or his election agent's consent, for in one case he is himself the candidate, and in the other, he is the candidate's *alter EGO*. Mark : the proviso to section 123(2) speaks of 'any such person' as is referred to in the body of that provision; that the body of subsection (2) mentions of only a 'candidate, or his agent, or any other person acting with the consent of the candidate or his election agent'; and as per Explanation(1)to section 123 of the Act, an agent includes, besides an election agent and a polling agent, any person who can be held to have acted as an agent in connection with the election with the consent of the candidate. Turning to section 100(1)(b) it will be seen that thereunder commission of any corrupt practice is a ground for declaring the election to be void only if the same has been committed by the returned candidate or his election agent, or by any other person with the consent of the returned candidate or his election agent. The election law on this aspect in this country is, as stated in *S. N. Balakrishna V. Fernandez* (AIR 1969 SC 1201) (at p. 1219)—

> "........an agent cannot make the candidate responsible unless the candidate has consented or the act of the agent has materially affected the election of the returned candidate. In the case of any person (and he may be an agent) if he does the act with the consent of the returned candidate there is no need to prove the effect on the election."

23. In the *Ram Dial* case the charge was that the returned candidate (the appellant therein) approached Sat Guru Maharaj Pratap Singh, a religious head, who had some personal grievances against the Chief supporter of the defeated candidate (the 1st respondent therein) and through him (Sat Guru) also approached another religious head, Maharaj Charan Singh, 'and *got issued* Farmans (orders) by both these religious heads to their followers in the constituency to the effect that their Dharma required them to whole heartedly support respondent No. 1 (in the election petition i. e., the appellant) and to oppose the candidature of the petitioner (in the election petition, i. e., the 1st respondent in the appeal) and that if any of the followers dared to act against their Farmans, the wrath of the aforementioned Gurus would fall upon him and he would be the object of Divine displeasure'. The Election Tribunal held that this charge has been proved by the 1st respondent in the appeal and the High Court affirmed the same. The Supreme Court said :—

> "If the religious head had said that he preferred the appellant to the other candidate, because, in his opinion, he was more worthy of the confidence of the electors for certain reasons good, bad or

indifferent, and addressed words to that effect to persons who were amenable to his influence, he would be within his rights, and his influence, however great, could not be said to have been misused. But in the instant case, as it appears, according to the findings of the High Court, in agreement with the Tribunal, that the religious leader practically left no free choice to the Kamdhari electors, not only by issuing the hukam or farman, as contained in Ext. P1, quoted above, but also by his speeches, to the effect that they must vote for the appellant, implying that disobedience of his mandate would carry divine displeasure or spiritual censure, the case is clearly brought within the purview of the second paragraph of the proviso to s. 123(2) of the Act."

24. On Issues 5, 6 and 8 I have already held that the petitioner has not established that the Political Committee consisting of the representatives of the Foronas of the Trichur Catholic Diocese or Rev. Fr. Thomas Thalachira (PW6) or Rev. Fr. Cyriac Mundumpala or Rev. Fr. Antony Anthicad has, in publishing Exts. P4 and P5 or in delivery the sermons impugned herein, acted as the agent of or with the consent of the 1st respondent or his election agent. Therefore, it is not really necessary to examine the further question as to whether all or any of them have or has transgressed the limits of persuasion by making threats of divine displeasure or spiritual censure the electors vote for the 1st respondent and refrain from voting to the petitioner. However, parties having joined issue thereon, it is necessary to decide the same for the sake of completeness.

25. It is difficult to conceive of Exts. P4 and P5 as anything other than a counsel or entreaty explaining why, of the two fronts, the Janadhipathya Munnani and the Idathopaksha Janadhipathya Munnani, one-the first mentioned Munnani—and not the other the second said Munnani—is to be preferred. In so doing these publications threw the whole weight of the teaching of the Catholic Church based on the doctrine of existence of God and the state of affairs which (according to their author, P.W.6) are obtained in countries under communist rule. Ext. P4 proceeds on the basis of a resolution passed by the Kerala Catholic Bishop's Conference and Ext. P5 explains and supports Ext. P4 with reference to (as stated therein) the tenets of communism that communism is opposed to God and religion. Ext. P4 opens by saying that [as stated in Ext. P4 (a)] therein its object is to give guidelines (മാർഗ്ഗ നിർദ്ദേശങ്ങൾ) That portion of Ext. P4 marked Ext. P4 (b) is to the effect:—

> "There are mainly two fronts on the scene; those who believe in God and democracy on the one hand and atheistic and anti-religious forces not having faith in democracy on the other. In this fight between these two alignments, don't create such situations whereby the democratic forces become weak by discord and disunion amongst themselves or by entering into such alliances as would help atheistic forces. This is the desire of the Bishops of Kerala."

26. The other passage in Ext. P4 on which reliance is placed on behalf of the petitioner, Ext. P4 (c), is a quotation from the editorial of a paper 'Sathyadeepam' and the same is to the following effect:—

> "Each Catholic is bound to Act in accordance with the *guidelines* given by the Bishops. No one who treasures religion and ethics, a Catholic or (for that matter) any one who believes in religion, cannot support the atheistic forces or their allies. To act otherwise would be in opposition to their belief; it would be a challenge to the holy teaching authority of the church. Obviously the church-leadership which has given these *guidelines* has no vested interest or selfish motives. As dignitaries of the church they have the right and the responsibility to give *such guidelines* at this crucial moment; the reason is, politics does not mean governance alone but the way of governance founded on some political ideology and when such ideology is opposed to the legitimate rights of the church and the individual, it is the responsibility of the church by virtue of its teaching-authority, to point out the same; especially taking into account past experiences."

27. In these two passages or in Ext. P4 read as a whole there is absolutely no compulsion under any kind of threat that the electors are to vote one way and not the other way. No doubt there in an entreaty to vote one way based on the guidelines (മാർഗ്ഗ നിർദ്ദേശങ്ങൾ) given by the Bishops which guidelines (as Stated therein) have been given on ideological grounds.

28. Ext. P5 is a pamphlet running to 11 pages rather than a leaflet. The only passage therein on which reliance is placed by the learned counsel for the petitioner at the time of argument is the very last paragraph therein (not separately marked) on page 11 thereof. It is to the following effect:—

> "Basically and substantially, in theory and in practice, communism is an atheistic force. Wherever this force has come into power there these tenets (laid down by Marx, Lenin and Stalin to the effect that communism is opposed to belive in the existence of God and practice of religion which P.W. 6 has quoted in the immediately preceding portions therein) have been brought into force. In such places churches have been destroyed; priests and nuns have been killed; Bishops have been deported; Cardinals have been imprisoned; educational institutions have been taken over; freedom of opinion (expression) and freedom of writing (press) have been abolished; freedom fighters have been done away with; and people have been made into slaves. In 1957 Kerala experienced on a small scale the reflection of this global phenomenon. That is why the Bishops have at this crucial juncture given *guidelines* to believers (in God) to see that atheistic forces do not capture power".

29. Ext. P5 (a) guidelines given by the Bishops on 25-9-1979 as extracted at the beginning of Ext. P5 is to the effect:—

> "If forces opposed to theism come into power the consequences would be drastic; those who believe in God and democracy have to

stand united so that their strength is not depleted; those who love the community have to make all efforts in that direction; in the present critical situation do not help atheistic forces openly or secretly."

30. Ext. P5 also either by the passages read above or the pamphlet read as whole does not hold out any threat or compulsion that the electors are to vote one way and not in any other way. For reasons stated therein which are based on ideological differences, electors are entreated to vote for Janadhipathya Munnani and to defeat the Idathupaksha Janadhipathya Munnani. Such entreaties are within bounds. Ext. P5 (b) is a passage criticising some leaders of an Idathupaksha constituent party who earlier welcomed Ext. P5 (a) statement issued by the Bishops as a 'bold step' and later aligned with that Munnani. As stated therein they have gone after power thereby destroying democracy and betraying the church and the community and (again as mentioned therein) people have rejected them for that reason saying that they have destroyed democracy. According to P.W.6, author of Ext. P5, this passage has reference to the Kerala Congress (Mani Group).

31 The evidence of PWs. 9 and 12 as regards Rev. Fr. Mundumpala's sermons does not reveal that he appealed to the fears of the congregation that any one who votes for the Idathupaksha Janadhipathya Munnani would be sinning or would be rendered the object of divine displeasure or spiritual censure. His sermons according to these witnesses were substantially on the same lines as the contents of Ext. P4 which was read out by him during the sermons. The evidence of P.Ws. 13 and 14 about Rev. Fr. Anthicad's sermon's goes further than that given by P.Ws 9 and 12, and is to the effect that this priest threatened with the consequence of denial of sacrements if any one in non-compliance with what he said voted for the Idathupaksha Janadhipathya Munnani. I have already pointed out that P.W.9 is a member of the Congress (U) Party of the petitioner and P Ws. 12 to 16 are supporters and sympathisers of that party and therefore, applying the well-settled rule laid down in *Rahim Khan* v. *Khurshid Ahamed* (A.I.R. 1975 SC 290 at 298-99) and subsequent decision, it will be unsafe to act upon their evidence alone to find corrupt practice. It should be remembered that the sermons given by these two priests were on lines with the contents of Ext. P4 and that document repeatedly speaks of its contents only as 'guidelines' (മാർഗ്ഗ നിർദ്ദേശങ്ങൾ), attaching no consequences for non-compliance with those guidelines.

32. In *Kanti Prasad* v. *Purshottamdas* (A.I.R. 1969 SC 851 at 857) the Supreme Court said that' the law does not place any bar on describing a party as irreligious' and in *Ebrahim Suleiman Sait* v. *M. C. Mohammed*, (1980) 1 SCC 398 at 402) that Court following the abovesaid case took the view that to describe members of a party as 'anti-religious people' does not violate the election laws. In short the purport of Ext. P4 and Ext. P5 as well as that of the four sermons rendered by the two priests, Rev. Frs. Mandumpala and Anthicad, is that the Idathupaksha Janadhipathya Munnani is anti-God, anti-religious and anti-democratic. For that reason the electorate was

exhorted to vote for the Janadhipathya Munnani, which, according to these documents and as stated in these sermons, stands for God, religion and democracy.

33. I find Issues 4 and 7 against the petitioner and in favour of the 1st respondent and answer these issues in the negative. Issue 9 raises the questions as to whether the corrupt practices alleged in the petition, if found, were committed in the interests of the 1st respondent and whether the election of the 1st respondent has been materially affected by such corrupt practices. This latter question may not, perhaps, arise in relation to a charge of commission of corrupt practices with reference to section 100 (1) (b) of the Act. Besides, in view of my finding on Issues 4 and 7 neither of the two further questions formulated under Issue 9 really arise. It has also not been proved that P.W.6 published Exts. P4 and P5 and the two priests rendered the impugned sermons in the interests of the 1st respondent though these acts might have benefited him. There is also no proof of the election of the 1st respondent having been materially affected by these publications and these sermons. Issue 9 is answered as above.

34. *Issue* 10: The petitioner's case is that the 1st respondent violated section 130 (1) (c) of the Act by visiting many of the polling stations till about 11 a. m. on 21-1-1980, the polling day, by driving into the polling stations the car carrying his decorated symbol 'hand' in which he travelled. It is his further case that at about 11 a. m. some of his (petitioner's) workers stopped this car at a place called Cherukunnu in Puthoor Panchayat and though the police was informed of it and they came there, they did not take any action. According to the petitioner this has materially affected the result of the election. Note that the specific pleading is that the 1st respondent travelled exhibiting his symbol on his car till 11 a. m. on 21-1-1980 and during such travel till 11 a. m. he entered the premises of the polling stations in that car. I am mentioning this because evidence has been attempted to be adduced to prove that he violated section 130 (1) (c) of the Act by travelling in a car carrying his symbol even after 11 a. m. and without going into the premises of the polling stations in such a car but by travelling in such a car along the road within the prohibited distance of 100 metres of several unspecified wayside polling stations. No doubt, being not a corrupt practice the pleadings need not set forth the full particulars thereof as required by section 83 (1) (b) of the Act, but still, as provided in section 83 (1) (a) of the Act, the petition shall contain a concise statement of the material facts on which the petitioner relies, and this concise statement, so far as the petition on hand is concerned, is that the 1st respondent travelled and entered into the polling stations as aforesaid till 11 a.m. on 21-1-1980

35. The evidence on this point consists of the oral evidence of P.Ws.1 to 5 and P.W.11 besides that of the petitioner as P.W. 17 and Exts. P1 series, P2 series and P3 series. Of these witnesses, P.Ws. 1 and 2 are police officers who were on election duty, P.W 3, the officer-in-charge of one of the three mobile parties and P.W.5 the Returning Officer for the Ollur Assembly Constituency. It is seen from the evidence of P.W.1, the Circle Inspector, that Sub-Inspector Varappan (not examined) who was in charge of patrolling

in the area where Cherukunnu is situate informed the Police Control Room at Trichur about a skirmish at Cherukunnu over the 1st respondent carrying and exhibiting his symbol on the car in which he was travelling. This was at 10.20 a. m. as is seen from Ext. P2 (c) in Ext. P2 (a)—Ext. P2 (a) consists of pages 67 to 69 of Ext. P2, Election General Diary from 27-12-1979. At P.Ws. 1's direction the Head Constable recorded the information, first recording the time 10.20 Ext. P2 (c). This information was to the effect that there was objection from some quarters to the 1st respondent exhibiting the symbol on his car and that he (Sub Inspector Varappan) has instructed not to take the car within 100 metres of the polling station. There is no indication that at the time this information was given to the Control Room or at any time prior thereto, the car was or had been within 100 metres of any of the polling stations. P.W.1 proceeded to the trouble spot with a police party at about 10.30 a. m. as directed by the Superintendent of Police. He reached the spot at about 11 a.m. When he reached there Sub Inspector Varappan and the patrol party under him were there. The 1st respondent's car was then parked at a distance of over 200 metres from the polling station. The 1st respondent's symbol was displayed in the front of the car then. While P.W.1 was there, P.W.2, another Sub Inspector reached the spot. When P.W.1 reached there the workers of the petitioner and of the 1st respondent also were there. He pointed out to them that it will be illegal to take the car within 100 metres of the polling station and there is no legal bar in exhibiting the symbol outside that limit. He asked for written complaint, if any, and no complaint was received. The car left the spot at 12 noon and thereafter P.W.1 returned to Trichur reaching back there at 12.30 p. m. He then recorded Ext. P2 (b) which corroborates what he said in his evidence as to what transpired at the spot and where the car was being parked. Ext. P1 (a) entry in Ext. P1 note book maintained by P.W.1 as provided for by the Police Manual also corroborates his oral evidence. P.W.2, hearing about the above incident at about 11 a. m. while he was patrolling at Ollur went to the spot reaching there at about 11.15 a. m. Ext. P3 (a) entry in Ext. P3 note book maintained by him as required by the Police Manual is also to that effect. According to him the 1st respondent's car was at 150 metres away from the polling station. P.W.3 while patrolling with his mobile party saw the parked car at Cherukunnu at about 11.30 a. m. but he says he cannot say how far away from the polling station it was so parked. When he went there one Sub Inspector was there. P.W.1 then came there and thereafter P.W.2 also arrived there. P.W.5's evidence is only to the effect that somebody informed him over the phone of the incident including the facts of the arrival of the police and of the car leaving the place then. He did not take any further steps in respect of it as the same was not called for. The evidence discussed above instead of proving the allegation disproves it.

36. The other two witnesses examined to prove this point are P. Ws. 4 and 11. According to P. W. 4 he saw at 10 a. m. or 10.15 a. m. the car parked at the gate of the School at Cherukunnu where polling booths were

provided. He saw it a second time when the car was returning after it was driven off from the gate to east. The second time he saw it at 11 a.m. Then the same was lying stationery on the road having been stopped by people. According to him the car was then within 100 yards of the school. This witness is a sympathiser of Congress (U). According to him, though the polling booth in which he was to give his vote was at Elamthuruthi, 1½ kilometres away from his house, he went to Cherukunnu Polling Station which is 3½ kilometres away from his house in the opposite direction because he simply thought that after all polling is going on that day and Cherukunnu is a polling station in Puthur Panchayat. However, he improves upon this reason by later on saying that he went there on his way to his farm lying beyond the Cherukunnu School, though there was no work on that farm that day. He did not go to any other polling station that day except those at Elamthuruthi and Cherukunnu. His evidence is that he returned from Cherukunnu only at 1.45 p. m. Yet he does not say anything about the arrival there of P. Ws. 1 to 3 who are also witnesses cited and summoned by the petitioner himself to prove the same allegation. In the light of the evidence of P. Ws. 1 to 3 and 5 and Exts. P1 and P. 2 and P3 series discussed above. I have no hesitation to hold that this witness is not a truthful witness. I have already held that the evidence of P. W. 11 is unworthy of credence. P. W. 11 says that he saw the car in front of the school where the polling Station at Puthur was provided. According to him, he was the polling agent of the 1st respondent at Cherukunnu (I have already held that his evidence to this effect cannot be accepted) and went to Puthur to give his vote. He voted at 9.45 a. m. When he reached Puthur Polling Station the car was already there at the gate. The 1st respondent left Puthur Polling Station after this witness arrived there. According to this witness there was a wordy quarrel about this incident between the workers of the petitioner and the 1st respondent. If so, it is surprising that no one seems to have reported about it to the police or any authority. As already said it is not possible to place any reliance on this witness.

37. P. W. 4 has deposed that there are many wayside polling stations on the way to Mannamangalam and Marotticbal booths, be it from Ollur or from Trichur. So also, the petitioner as P. W. 17 says that almost all the booths in Ollur Constituency are within 10 to 50 metres of one or the other of the roads. However, there is absolutely no evidence that the respondent went within the prohibited distance of 100 metres of any such wayside polling Stations in his car carrying and displaying his symbol.

38. The allegation of exhibiting or displaying his symbol by the 1st respondent within the prohibited distance is, if proved, a matter coming under section 100 (1) (d) (iv) of the Act, and therefore the petitioner has further to prove that the result of the election so far as the 1st respondent is concerned has been materially affected thereby. There is absolutely no evidence in this regard. In fact it was not even attempted to be proved.

39. I answer both the questions raised by Issue 10 in the negative, that is, against the petitioner and in favour of the 1st respondent.

40. *Issues* 11 *and* 12: The petitioner's case is that the provision contained in article 326 of the Constitution has not been complied with in that several persons who, as on the relevant date (1-1-1979) were less than 21 years of age have been registered as voters in the electoral rolls for the Ollur Assembly Constituency. According to the petitioner if the votes of these persons are eliminated from the counting, the votes cast for the 1st respondent will be much less than the valid votes cast for the petitioner. The 1st respondent denies these allegations and further contends that in view of the provision contained in section 62(1) of the Act under which 'every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency', the petitioner is precluded from characterising the votes cast by the persons alleged to be under the age of 21 as on the relevant date as illegal votes.

41. The learned counsel for the petitioner relied on the Full Bench decision of this Court in *P. Kunhiraman* v. *Krishna Iyer* (AIR 1962 Kerala 190) in support of his contention that this court can go into the question as to whether a person whose name is on the electoral roll and has voted had or had not attained the age of 21 as on the material date and on finding that he had not, exclude his vote from the count. No doubt this decision supports him, but the Supreme Court in *R. Chandran* v. *M. V. Marappan* (A.I.R. 1973 SC 2362) has held that this decision of this Court is erroneous. The same view as that taken by the Full Bench of this Court in *Kunhiraman's* case appear to have been taken by the Madras and the Andhra High Courts also and the Supreme Court in the above-mentioned case said that the decisions of these three courts are erroneous. The Supreme Court approved as correct the opposite view taken by the Gujarat, Allahabad, Bombay and Punjab and Haryana High Courts and in a subsequent decision by the Madras High Court. I would with advantage read the following passage from *Roop Lal* v. *Dhan Singh* (AIR 1968 Punjab and Haryana 1) (F.B.) (at p. 4) the decision which, according to the Supreme Court in the above mentioned case, lays down the correct law on this point:—

> "To my mind the scheme of the Act of 1950 is that if a person fulfils the conditions of registration as given in Section 19 and is not disqualified for registration under Section 16, and is also not shut out from registration by the provisions of Sections 17 and 18, he has a right to have his name on the electoral rolls of the constituency. There are ample provisions in the succeeding sections of the Act of 1950 for making challenge to that entry to enable in proper cases correction of that entry either by the registration officer at his own motion or on an application made to him viz., Section 22, and from his decision appeal is also provided by Section 24 but the final date for making the amendment, transposition or deletion of entries in the electoral roll is the last date for making nominations for an election in that constituency. Thereafter, the person whose name has been entered in the electoral roll becomes an elector in relation to that constituency as defined in Clause (e) of Section 2 of the 1951 Act

and by subsection (1) of Section 62 is conferred the right to vote in that constituency subject, however, to the exceptions in subsections (2) to (5) of that section." "10. So far as, therefore, the two Acts viz., the Act of 1950 and the Act of 1951, are concerned, the position appears to be that after the electoral rolls have been finalised the vote of a person, whose name is on the electoral roll, cannot be challenged as being void on the ground that he was under 21 years of age on the qualifying date."

42. By the above-mentioned authoritative pronouncement of the Supreme Court the law on this aspect is now well-settled and section 62(1) of the Act governs the contention raised on behalf of the petitioner in relation to Issues 11 and 12. Section 62(1) says that 'except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency'. The exceptions to the above general rule are contained in subsections (2) to (5) of section 62. Even if a person has been entered in the concerned electoral roll, if he is a person falling under one or the other or all or some of these subsections, subsections (2) to (5) of section 62 of the Act, then, and then alone, he would be disentitled to vote. Subsection (2) of section 62 of the Act requires to be noticed specially in this connection. Thereunder, even if a person has been entered in the concerned electoral roll, if he is one 'subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950, (hereinafter, the 1950 Act) he would not be entitled to vote. Section 16 of the 1950 Act speaks of three disqualifications, viz., '(a) is not a citizen of India; or (b) is of unsound mind and stands so declared by a competent court; or (c) is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections'. It is with reference to these principles that the Supreme Court in *H. M. Trivedi* v. *V. B. Raju* (AIR 1973 SC 2602) (in para 24 at p. 2607) relied on by the petitioner's learned counsel said that the electoral roll is not conclusive nor final on these matters of exception provided by subsections (2) to (5) of section 62 of the Act, and that 'the question whether a person whose name is entered in the electoral roll is *qualified* under the Constitution and whether he suffers from any of the disqualifications specified in section 16 (of the 1950 Act) can always be gone into by the court trying an election petition'. The Supreme Court in the *H. M. Trivedi* case pointed out that the principles laid down by that Court in *Baidyanath Panjiar* v. *Sita Ram Mahto* (AIR 1970 SC 314) and *Wopansaa* v. *N. L. Odyuo* (AIR 1971 SC 2123) are different and cannot 'by analogy be extended to an entry in the electoral roll on the basis of a wrong adjudication of the question of ordinary residence'. The Supreme Court there said:—

"And viewed from the aspect of public policy as reflected in the provisions of the 1950 and 1951 Acts, we do not think that a wrong decision on a question of ordinary residence for the purpose

of eutrriug a prrson's name in the elretoral roll should be rreated as a jnrisdietioual rrror which cau be judirially revirwrd either in a rivll court or before an eleetion tribunal". (para 27 at p. 2608)

43. Thr above deeisiou was reudered with rrferener to clause (b) of section 19 of the Represeutation of the People Act, 1950, aud it will be interesting to notice that the question raised in the ease on haud is in relation to clause (a) of sretion 19 of that Aet whieh rrads:—

"19. Conditions of registration—Subjret to the foregoiug provlsions of this part, rvery person who—

(a) is uot less than twenty-one years of age ou the qualifying datr aud

(b) is ordiuarily resident iu a constitueney,

shall be rntitled to be registered in the rlrrtoral roll for that constituency."

Ou the aualogy of the principle laid down by the Supreme Court in relatiou to clause (b) of Sertion 19 of that Aet, it has to be held that a wrong adjudication of thr question of agr for the purpose of euteriug a persou in thr electoral roll is uot matter of jurisdictional rrror.

44. Auother deeision relied ou by the learned eounsel for the petitioner iu this couneetion is *R. P. Singh* v. *R. B. Jha* (AIR 1976 SC 2573). That decisiou, following *Baidyanath Panjiar* v. *Sita Ram Mahto* (AIR 1970 SC 314) and pointiug out that sretion 23 (3) of thr 1950 Act which prohibits the coneerned offieer from iutrrfrring with thr rleetoral roll of a constitueney after thr date for makiug nominations for an rlrrtion in that coustitueney or iu the parliamentary constitueney within whieh that eunstitueucy is enmprised and before the completion of that election, is both on aecount of its language and in view of its objret, a mandatory provision, held that the question whethrr a person has beru rntered iu the rleetoral roll in breach of seetiou 23 (3) can be rnquired iuto by the court in au election petition and the votr given by a person whose name has been eutrrrd in violation of sertion 23 (3) ran be exelnded from the count because, despite thr entry in thr electoral roll, he has uo right to vote. Thesr decisions takr thr view that the qnestion involvrd in sueh a ease is our concerning thr jnrisdiction of thr authority rmpowered to iurlnde a persou in the elrctoral roll, and dnring thr period mentioned in section 23 (3) of the 1950 Art, hr has no jurisdietion to inelndr a person in the electoral roll. Thr Supreme Court said that thr expression 'for thr time being rutered in thr rlectoral roll' in section 62 (1) of the 1951 Act is to br uuderstood as: 'for the time beiug entered in the electoral roll in accordance with law', that is to say, the eleetoral roll that was in force on the last day for making the nomiuatious for the electiou and that therefore, an objeetion ean be validly taken to the franebise exereised by electors whose names werr ineluded in the electoral roll after the last date for makiug nominatiou. These deeisions have no application to the prrseut ease. In *H. M. Trivedi's* ease, the Supreme Court held that the prineiple stated in the *Baidyanath* ease eannot be extended by

analogy to question arising under section 19 (b) of the 1950 Act, and in my view, the same is to be said with reference to the question arising in this case which is one under section 19 (a) of the 1950 Act.

45. In the light of the above discussion Issue 12 has to be answered in the affirmative, that is, against the petitioner and in favour of the 1st respondent. I do so.

46. In view of the finding entered on Issue 12, Issue 11 does not arise in this case. However, that issue having been raised, the same requires to be answered. This issue raises four questions, viz., (i) whether any one entered in the electoral rolls of the Ollur Constituency is under the age of 21 as on 1-1-1979; (ii) if so, are such persons entitled to give vote; (iii) are their votes invalid; and (iv) has the election of the 1st respondent been materially affected for this reason.

47. To substantiate the petitioner's contention on point (i) above stated, he relies on Exts. P8 to P13 electoral rolls prepared in respect of some of the Panchayat Wards of the Ollur Assembly Constituency under the provisions of the 1950 Act and the Registration of Electors Rules, 1960 and Exts. P8 (a) to P13 (a), which according to the petitioner, are the corresponding electoral rolls for the respective Panchayat Wards prepared under the provisions of the Kerala Panchayats Act, 1960 and the Kerala Panchayats (Publication of Electoral Rolls and Publication of Polling Stations) Rules, 1962. The case of the petitioner is that several of those who have been shown in Exts. P8 (a) to P13 (a) as having attained the age of 18 as on 1-1-1978 (the relevant age and the material date for preparing these electoral rolls) are shown as having attained the age of 21 as on 1-1-1979 in Exts. P8 to P13. This argument proceeds on the presumption that Exts. P8 (a) to P13 (a) electoral rolls show the correct age, a presumption without any evidence in that behalf. Though P.W. 17, the petitioner, has sworn that he has verified the school records to find out the correct age, no such records have been produced in this case; nor has he examined any witness to prove this point. The petitioner has failed to prove that any one below 21 years of age has been entered in Exts. P8 to P13 electoral rolls for the Ollur Constituency.

48. In view of the decision of the Supreme Court in *H. Chandian* v. *M. V. Marappan* (AIR 1973 SC 2362) and my finding on Issue 12, it has to be held that every person entered in the electoral rolls of this constituency is entitled to give his vote. I hold so.

49. No vote given by any of those who has been entered in the electoral rolls of this constituency is invalid for the reason that he is under the age of 21.

50. It has not been proved that any of those persons, whom it is alleged, are under the age of 21 as on 1-1-1979, has exercised his franchise much less in whose favour it has been exercised. These are matters to be proved (and the onus is heavily upon the petitioner) and not matters for guess work. See *Vashist Narain Sharma* v. *Dev Chandra*

(AIR 1954 SC 513 at 516) and *S.N. Balakrishna v. Fernandez* (AIR 1969 SC 1201 at 1225). In the absence of proof of these matters it cannot be held that the election of the 1st respondent has been materially affected for this reason.

51. I find all the points arising under Issue 11 against the petitioner and in favour of the 1st respondent.

52. *Issues 1 and 3*:—The learned counsel for the 1st respondent did not press the contentions on which these issues are raised. These issues are found against the 1st respondent and in favour of the petitioner.

53. *Issue 2*:—This issue has been raised on the contention of the 1st respondent that the affidavit in support of the petition is not in conformity with the requirements of law and that therefore the petition is liable to be rejected *in limine*. The contention is that the said affidavit is not one sworn before any one of the authorities mentioned in rule 94A of the Conduct of Elections Rules, 1961. The said affidavit is one sworn before the learned counsel for the petitioner, and the point for consideration is as to whether he is competent to administer affirmation to the petitioner.

54. Under the proviso to section 83 (1) of the Act, where the petitioner alleges any corrupt practice, along with the petition the petitioner has to file a supporting affidavit in the prescribed form. Rule 94A of the above-mentioned rules prescribes that this affidavit shall be sworn before a magistrate of the first class, or notary or a commissioner of oaths and it shall be in Form 25. The relevant portion of this Form is to the effect that it should contain an authentication that the affidavit has been sworn by the deponent before any one of the aforesaid authorities. This authentication is to be made by the authority before whom the deponent swears. The learned counsel for the petitioner submits that he is a Commissioner of Oaths, and that, therefore, he is competent to swear the deponent—the petitioner herein.

55. The expression 'Commissioner of Oaths' is not defined in the Act or the Rules mentioned above. No other statutory definition was also brought to my notice. This expression appears to have been borrowed from the English Statute, Commissioners for Oaths Act, 1889, under which the Lord Chancellor is enabled to appoint Solicitors and other fit persons to administer oaths (including affirmations and declarations) to persons coming before them. Analogous power is conferred on the High Court by section 139 (b) of the Code of Civil Procedure, 1908 whereunder in the case of any affidavit under that Code the High Court may appoint any officer or other person to administer the oath to the deponent. So also section 297 (1) (b) of the Code of Criminal Procedure, 1973, (section 539 of the old Code) provides that affidavits to be used before any court under that Code may be sworn or affirmed before any Commissioner of Oaths appointed by a High Court or Court of Session. Under section 3 (2) of the Oaths Act, 1969, any person may administer oaths and affirmations for the purpose of affidavits, if empowered in that

behalf by the High Court in respect of affidavits for the purpose of Judicial proceedings (there was no such provision in the Indian Oaths Act, 1873). By rule 76 of the Rules of the High Court of Kerala, 1971 made by this High Court by virtue of its powers conferred by article 225 of the Constitution of India, section 122 of the Code of Civil Procedure, 1908 and all other powers enabling it in this behalf to regulate its procedure, this Court has appointed, amongst others, an advocate to administer oaths and affirmations in the case of affidavits filed in this Court. The submission is that, therefore, an advocate is a Commissioner of Oaths, and in my view this is correct.

56. Though, perhaps, as argued on behalf of the 1st respondent, it may be that a Commissioner of Oaths appointed under section 139 of the Code of Civil Procedure, 1908 may be competent only to administer oaths and affirmations where the affidavits are to be filed before civil courts, and those Commissioners, appointed under section 297 of the Code of Criminal Procedure, 1973 are competent to do so only where such affidavits are to be filed before criminal courts, in so far as the appointment here is by rule 76 of the High Court Rules, 1971 made by this Court under all its enabling powers, and since under section 87 (1) of the Act, the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits, as nearly as may be governs the trial of an election petition, there is no merit in the contention advanced on behalf of the 1st respondent that an advocate is not a Commissioner of Oaths mentioned in rule 94A of the Conduct of Elections Rules, 1961. I am supported in this view by the decision of the Supreme Court in *Kamal Narain* v. *Dwarka Prasad* (AIR 1966 SC 436 at 439), a case decided before the Oaths Act, 1969 was enacted. The Supreme Court therein held that rule 94 A of the Conduct of Elections Rules, 1961 'does not state before which commissioner the affidavit must be sworn' and therefore 'it must be read as including all commissioners of Oath duly appointed'. The Supreme Court in this case pointed out that the object of rule 94 A is that if the allegation of corrupt practice is found to be false, it should be possible to take action against the deponent for perjury. A clerk appointed under section 139 (c) of the Code of Civil Procedure, 1908 was therefore held to be competent to administer oath in the case of an affidavit falling under the proviso to section 83 (1) and rule 94 A. In that connection the Supreme Court said:—

> "It is argued that Commissioners appointed under one statute cannot swear affidavits prescribed under another statute and S. 539 of the Code of Criminal Procedure is also cited as an instance. This may be so. It may be that an affidavit sworn by a District Clerk of Court may not be good for the purpose of the Code of Criminal Procedure and vice versa but that is because the restriction is to be found in S. 139 of the one Code and S. 539 of the other, Rule 94-A makes no such condition and makes receivable an affidavit sworn before a Commission of Oaths without specifying of what kind. In this view of the matter the affidavit sworn before

the District Clerk of Court, who undoubtedly is a Commissioner of Oaths, can only be excluded by taking an extreme and technical view which, in our opinion, is not justified."

57. In the view taken by me as above I do not think that the decision in *Dwarka Prasad* v. *Kamalnarain* (AIR 1954 MP 273) cited on behalf of the 1st respondent has any application to this case. On Issue 2 I hold that the affidavit in support of the allegation of corrupt practice is in conformity with the requirements of law and that therefore this petition is not liable to be rejected on the ground that it is not so.

58. *Issues* 13 *and* 14:—In view of the findings entered hereinbefore on Issues 4 to 12 (inclusive) these issues have to be answered in the negative, that is to say, against the petitioner and in favour of the 1st respondent. I do so.

59. *Issue* 15:—I dismiss this petition with costs which I fix as Rs.2,000. The petitioner shall pay the same to the 1st respondent.

The Registrar shall intimate the substance of this decision to the Election Commission and the Speaker of the Kerala State Legislative Assembly without delay and shall send to the Election Commission an authenticated copy of this decision as soon as possible, as required by section 103 of the Act.

9th September 1980.

(Sd.)
GEORGE VADAKKEL,
Judge.

By order,
(Sd.)
K. GANESAN,
Secretary to the Election Commission of India.

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